United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2468

To be argued by
DON D. BUCHWALD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2468

UNITED STATES OF AMERICA,

Appellee,

—v.—

AARON STEWART,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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Preliminary Statement

Aaron Stewart appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on November 7, 1974, after a three-day trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 74 Cr. 498, filed on May 17, 1974, charged Stewart and seven other defendants ("seven co-defendants") with conspiracy to violate Title 18, United States Code, Section 2113 in violation of Title 18, United States Code, Section 371 (Count One), bank robbery in violation of Title 18, United States Code, Section 2113(a) (Count Two) and assault during the commission of the bank robbery in

violation of Title 18, United States Code, Section 2113(d) (Count Three).*

Stewart's first trial commenced on July 24, 1974 and resulted in a hung jury. His retrial commenced on September 9, 1974 and concluded on September 12, 1974, when the jury found him guilty on all three counts.

On November 7, 1974, Judge Cannella sentenced Stewart to prison terms of five years on Count One, ten years on Count Two and ten years on Count Three to run concurrently. He also fined Stewart $10,000, $5,000 and $10,000 on the three counts respectively, making a total of $25,000.**

Stewart was remanded following his sentencing and is serving his sentence.

Statement of Facts

The Government's Case

The evidence established that on the morning of November 15, 1973, the First National City Bank, located on

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* Prior to the trial, five of the co-defendants—David Williams, James Evans, Frank Henegan, Reginald Stitch and Sandra Becote —entered guilty pleas to Count Two of the indictment; one co-defendant—Shirley Hall—entered a guilty plea to Count One of the indictment. One co-defendant—Robert Ruddock—had agreed to enter a guilty plea. A psychiatric examination of Ruddock was pending by state authorities in connection with an unrelated state offense for which Ruddock was being held. Ruddock's case was severed at the commencement of Stewart's first trial on July 24, 1974, which resulted in a hung jury.

** Henegan, Evans, Stitch, and Williams have been sentenced to terms of imprisonment ranging from seven to eleven years; Becote and Hall have been sentenced to terms of probation. Ruddock's plea has been adjourned pending the results of a psychiatric examination under 18 U.S.C. § 4244.

Bruckner Boulevard in the Bronx, New York was robbed by several armed individuals. A total of approximately $8,400 was taken during the robbery. (Tr. 131-135, 138-143)*

Bank surveillance photographs revealed that six individuals—five males and one female—were inside the bank participating in the robbery. They wore masks and/or disguises (GXs 1, 2 and 3; Tr. 25-26, 43, 48-50, 169).

The seven co-defendants, each of whom testified as a government witness at the second trial,** gave the following account of events:

In mid-October, 1973, plans were originally made to rob the bank. At that time five people planned the robbery and "cased" the bank—David Williams, Frank Henegan and Stewart (all of whom ultimately participated in the robbery on November 15, 1973), together with Joseph Daniels and David Lewis (who did not ultimately participate in the robbery). They did not proceed with the robbery on the designated day in October because the bank appeared to be too well guarded (Tr. 186-191, 213-214, 282-286, 306-307).***

In early November, 1973, Williams—identified by the other co-defendants as the leader of the group—made new plans to rob the bank (Tr. 19, 153-154, 163, 307, 322). On the morning of the robbery, the group assembled on 125th

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* Page references with the prefix "Tr." refer to the trial transcript. "A." refers to the Appellant's Appendix. "GX" refers to Government Exhibits.

** All, except Ruddock, had testified at the original trial of Stewart.

*** Of the seven co-defendants, only Williams and Henegan were aware of and testified concerning the October plans and the aborted October attempt to rob the bank.

Street and Eighth Avenue in Manhattan * and proceeded to a White Castle restaurant on Bruckner Boulevard near the bank (Tr. 28-29, 93, 152). When the group's designated getaway truck broke down, three members of the group—apparently Williams, Henegan and Ruddock—proceeded to a garage where at gunpoint they stole a Muslim school van which they brought back to the White Castle (Tr. 31-32, 200-201, 289-292, 326-328).

The group then proceeded in three cars and the van to a point on Bruckner Boulevard a few blocks from the bank. Shirley Hall remained with the automobiles while the other seven, including Stewart, proceeded in the van to the bank (Tr. 33-34, 149, 293).

James Evans and Sandra Becote were the first to enter the bank, pretending they were customers (Tr. 35-36, 93, 294). Within moments, Stewart, Henegan and Ruddock (all masked) and Stitch (wearing dark sunglasses and a hat) entered the bank and announced the holdup. Evans (who now pulled a ski mask over his face) and Becote (who wore a wig) went behind the bank counter to collect the money as the bank tellers and customers were ordered to lie face down on the floor (Tr. 36-38, 93, 149, 169, 176, 329-330). All wore gloves or tape (Tr. 30, 36-40, 93, 149, 169, 176, 329-330). After one minute, the six inside participants exited the bank and rejoined Williams who was waiting outside the front door by the parked getaway van (Tr. 38-39, 151, 294-296).**

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* Stewart had been picked up near his home on St. James Place in Brooklyn by Williams' common-law wife, Shirley Hall (Tr. 215, 247).

** Henegan had a sawed-off shotgun (Tr. 37, 295), Stitch had a simulated hand-grenade (Tr. 37, 330, 149), Ruddock and Stewart had pistols (Tr. 37, 150, 295, 318, 330).

The van proceeded to the getaway cars where Shirley Hall was still waiting (Tr. 40, 97, 251). The eight participants then split up into the three cars * and proceeded to Henegan's girlfriend's home in Queens (Tr. 40, 96, 151, 297) where the money was divided (Tr. 41, 99, 332).** The group then split up again.***

Each of the seven co-defendants identified Stewart as the eighth participant in the robbery (Tr. 55-56, 104-105, 156, 186, 255, 282, 335).****

The Defense Case

The defense called Special Agent Milton Ahlerich of the FBI. Ahlerich testified as to the dates on which the various defendants were arrested and interviewed concerning the Bruckner Boulevard robbery (Tr. 367-380).***** Ahlerich

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* Stewart apparently rode in a car with Shirley Hall and Sandra Becote (Tr. 251-252, 98-99).

** Each of the participants received approximately $1,100 except Shirley Hall, who received only $500 for her "lesser" role (Tr. 41, 252, 297).

*** Stewart was dropped off by Hall at his parents home on Bushwick Avenue in Brooklyn (Tr. 253, 99-100).

**** One or two days prior to the robbery the seven co-defendants had met and had been given instructions by Williams (Tr. 19-20, 25, 100-102, 196-197). Stewart had told Williams he would attend the meeting (Tr. 191-196). He failed, however, to attend (Tr. 102, 155, 196, 288). Thereafter, Stewart and Williams conferred by phone, and Williams told Stewart what had transpired at the meeting (Tr. 197-198).

***** Stewart was arrested on May 10, 1974 (Tr. 373). Williams was first arrested on November 19, 1973 in connection with the October 15, 1973 robbery of a bank in Kingston, N.Y. (Tr. 73). He was again arrested on February 13, 1974 in connection with a bank robbery in the Eastern District of New York and was in custody from that point forward (Tr. 376). He first made statements to the authorities concerning the details of the Bruckner Boulevard bank robbery on May 24, 1974, two weeks after Stewart's arrest (Tr. 378).

[Footnote continued on following page]

further testified that no "bait" money was found on Stewart's possession when he was arrested on May 10, 1974 (Tr. 375).

No other witnesses were called.

ARGUMENT

POINT I

The defendant was not prejudiced by the Trial Court's modified *Allen* charge which, if erroneous at all, was promptly corrected upon objection by defense counsel.

Appellant contends that the modified *Allen* charge * given by the District Judge after the jury had indicated that it had reached an impasse was improper. Appellant relies on this Court's decision in *United States* v. *Chaplin*, 435 F.2d 320, 323 (2d Cir. 1970), in support of his contentions that the charge was improper and that the conviction should be set aside,** and further asserts that the Trial

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Henegan and Ruddock were first arrested in connection with Eastern District bank robberies in January, 1974 (Tr. 371-72). Ruddock made his first statements concerning the Bruckner Boulevard robbery in mid-January, 1974 (Tr. 372), Henegan on March 12, 1974 (Tr. 379).

Evans was arrested on May 7, 1974 and immediately cooperated with the authorities (Tr. 51, 125-26, 379). Stitch surrendered on June 3, 1974 and a few days later made his first statements concerning the Bruckner Boulevard robbery (Tr. 379-380). Becote was arrested on April 7, 1974 (Tr. 373) and Shirley Hall surrendered on May 21, 1974 (Tr. 255, 372).

* *Allen* v. *United States*, 164 U.S. 492 (1896).

** The Trial Court brought the *Chaplin* case to the attention of the parties during the period between the verdict and the sentencing (Tr. 522; A. 130a).

Court's prompt curative instruction following defense objection to the charge was neither timely nor adequate. In so arguing, however, appellant both misconstrues the import of the *Chaplin* decision and too readily equates the language of the questionable charge in *Chaplin* with that in the court below.*

In *Chaplin,* the charge contained both a cancer analogy and references to accusations of crooked government agents, ("There is no question that this is important to both the government and to the government's witnesses in this case because they have been categorized as crooks, and it is of course an important case for the defendant"—*Chaplin, supra* at 323, n. 2), which, taken together, might more cogently have been argued to have resulted in a pro-prosecution flavor to the charge. The only remotely objectionable portion of the charge below involved the brief "cancer analogy". Furthermore, in contrast to *Chaplin,* the charge below emphasized that any verdict must be in accord with the jurors' consciences (Tr. 503; A. 113a). See *United States* v. *Hynes,* 424 F.2d 754 (2d Cir. 1970); *United States* v. *Barash,* 412 F.2d 26, 31-32 (2d Cir.), *cert. denied,* 396 U.S. 832 (1969). *United States* v. *Adcock,* 447 F.2d 1337, 1338 (2d Cir.), *cert. denied,* 404 U.S. 939 (1971).**

In any event, therefore, the *Allen* charge below, must be viewed as far less objectionable than that found not to

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* For the entire *Allen* charge below, see Tr. 502-505; A. 112a-115a. The charge in *Chaplin, supra,* is set out in 435 F.2d at 323, n. 2. See also *United States* v. *Bowles,* 428 F.2d 592, 595 (2d Cir.), *cert. denied,* 400 U.S. 928 (1970).

** Also, in contrast to *Chaplin* where the Court flatly stated "I suggest to you very strongly that I think it is possible to arrive at a verdict," the Court below, after initially complimenting the jurors on the seriousness with which they had undertaken their task (Tr. 502; A. 1129a), even-handedly observed that the minority, whether for acquittal *or* conviction, should consider the arguments presented by the majority (Tr. 503-504; A. 113a-114a).

constitute "plain error" in *Chaplin*. Indeed, the only portion of the charge to which the defense took exception below was that portion containing the "cancer analogy" (Tr. 506-507; A. 116a-117a).*

In distinguishing *Chaplin* on the grounds that there no objection was made at all, the defense loses sight of the real rationale for the *Chaplin* decision. As this Court observed in *Chaplin*: "[I]f, in actuality, there had been any pro-prosecution flavor to the charge, it could have been corrected upon proper and timely objection." *Chaplin, supra,* at 323-324. *Chaplin* recognized that the charge, if at all improper, was susceptible to correction. The Court below gave precisely such a corrective instruction following the defense objection, when a brief time later, after the jury had requested a re-reading of William's testimony, it stated:

> "I will like to make one remark before you leave. If you recall, just prior to this when you came in and you said you couldn't agree, in effect, I indicated to you certain principles and the fact that you should discuss the case amongst yourselves and make certain observations amongst yourselves.
>
> During the course of those discussions, on reflection, it seems to me I made an example which is entirely not within the scope of the facts in this case

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* Following the *Allen* charge, the Trial Court asked if there was any area of the law upon which the jury sought assistance and a juror inquired as to whether it made any difference whether a participant in the robbery stood outside the bank or inside the bank. The Trial Court responded in the negative and instructed the jury on aiding and abetting (Tr. 505-506; A. 115a-116a). The instruction on aiding and abetting was conceded by the defense to be a correct exposition of the law (Tr. 508; A. 116a). Appellant cites no authority in support of his contention on appeal (Appellant's Brief, Point VI) that a trial court's correct exposition of the law in response to a juror's question is reversible error. The argument is clearly frivolous.

at all; and as a matter of fact, I think it is an unfair example. And therefore, I tell you now to disregard the example that I gave you, and that example is of no value to you whatsoever in arriving at the verdict. You are to forget all about it.

However, I would close with the remark that in the last analyis what you must do here, regardless, of how you arrive at it, is to arrive at a verdict which is in accordance with your conscience, because if it is not in accordance with your conscience, you would only be stultifying your oath as a juror.

So do the right thing, the thing you think is right in your conscience, and once again disregard the example I gave you." (Tr. 508-509; A. 118a-119a).

The charge below, if at all improper, was susceptible to correction and was clearly and adequately corrected.* *United States* v. *DeAngelis*, 490 F.2d 1004, 1009-10 (2d Cir), *cert. denied*, 416 U.S. 956 (1974); *United States* v. *Lewis*, 362 F.2d 759, 762-63 (2d Cir. 1966); *United States* v. *DeSimone*, 452 F.2d 554, 556 (5th Cir. 1971), *cert. denied*, 406 U S. 959 (1972); *cf. United States* v. *Rivera*, 496 F.2d 952, 953-54 (2d Cir. 1974); *United States* v. *Cunningham*, 446 F.2d 194, 198 (2d Cir.), *cert. denied*, 404 U.S. 950 (1971).

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* Following the corrective instruction, the defense took no further exception. It did not contend, as it does on appeal, that the curative instruction was not sufficiently specific. The Trial Court's withdrawal of the "example" was clearly preferable to a repetition of the "cancer" terminology to which appellant had objected. Several hours later, the jury reached its verdict (Tr. 510, 523; A. 120a, 131a).

POINT II

No Brady material was withheld from the defense.

Appellant's contention that material information required to be furnished under *Brady* v. *Maryland*, 373 U.S. 83 (1963), was withheld is totally without merit.

During the course of Stewart's September, 1974 retrial and prior to the testimony of Robert Ruddock, the Government furnished the defense with Jenck's Act material relating to Ruddock's testimony (Tr. 88, 488-489; A. 35a, 98a-99a). Ruddock had not testified at the first trial in July, 1974.

Included among the Ruddock 3500 material was item 3509E (A. 19a-22a), a four-page FBI report of an interview of Ruddock conducted on January 15, 1974. After receiving 3509E, the defense, citing *Brady*, moved to dismiss the indictment against Stewart on the ground that the Government had failed to furnish the item at or prior to the *July* trial (Tr. 88-89; A. 35a-36a).

The *Brady* motion was properly denied by Judge Cannella (Tr. 520-521; A. 128a-129a). *Moore* v. *Illinois*, 408 U.S. 786, 797-98 (1972); *United States* v. *Tramunti*, 500 F.2d 1334, 1349-50 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3349 (1974). Item 3509E was in no sense exculpatory. In his January 15, 1974 interview, Ruddock referred to only six participants in the robbery including himself, mentioning neither Stewart nor Shirley Hall.* *United States* v. *Gugliaro*, 501 F.2d 68, 73 (2d Cir. 1974). Of these six, Ruddock stated in the interview that Williams was outside

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* By the time of the July trial, Shirley Hall had admitted her own involvement and had pled guilty to the conspiracy count. She testified at both Stewart trials.

the bank during the entire robbery (a fact subsequently corroborated by the other accomplices), leaving, according to Ruddock's January 15th statement, only five people in the bank. The bank surveillance photographs, offered and admitted without objection at both trials and previously displayed to the defense (A. 14a) established beyond doubt that six people participated in the robbery *inside* the bank. It was, thus, impossible for the defense to contend that there were only five *inside* participants. The defense contention (under its alternative "seven-man" theory) that David Williams was the sixth *inside* participant, was *contradicted*, not supported, by 3509E.

In addition, of course, any possibility of prejudice to Stewart is negated by the fact that Ruddock was extensively cross-examined on the basis of 3509E (Tr. 344-347). Indeed, 3509E was offered and admitted into evidence as Defense Exhibit B at the trial (Tr. 347; A. 19a-22a) and was referred to in both summations (Tr. 407-408, 449-452).

Finally, Stewart was aware of Ruddock's existence. Ruddock was named as a co-defendant and had been produced in Court for pleading on a writ a full six weeks prior to the July trial (A. 2). Stewart was thus on notice of the essential facts which would have enabled him to call Ruddock and take advantage of any exculpatory testimony that he thought Ruddock might furnish. *Williams* v. *United States*, 503 F.2d 995, 998 (2d Cir. 1974); *United States* v. *Tramunti*, 500 F.2d 1334, 1349-50 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3349 (1974); *United States* v. *Purin*, 486 F.2d 1363, 1368, n. 2 (2d Cir. 1973), *cert. denied*, 94 S. Ct. 2640 (1974); *United States* v. *Ruggiero*, 472 F.2d 599, 604 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

In conclusion, Stewart's *Brady* argument lacks merit because 3509E was not exculpatory, Ruddock's existence and whereabouts were at all relevant times known to the de-

fense, and 3509E was, in any event, produced and utilized during the September trial.*

POINT III

Appellant's other claims concerning the Trial Court's instructions to the jury are without merit.

Appellant objects to that portion of the trial court's charge concerning the "assaults or puts in danger" element of Count Three (18 U.S.C. § 2113(d)) (Appellant's Brief, Point V).**

The charge did not explicitly set forth the requirement that the robbers had the *objective capability* of causing physical harm by the means threatened. *United States* v. *Marshall,* 427 F.2d 434, 437-438 (2d Cir. 1970). There was uncontradicted testimony, however, that at least one of the weapons employed by the robbers was loaded (Tr. 239, 330; A. 44a, 53a) and the defense consistently maintained both in its opening and its summation that the only issue in dis-

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* Appellant also asks the Court to consider the three sealed statements of co-conspirators pertaining to the murders of Edward Taylor and Joseph Daniels (Appellant's Brief, Point III). The defense was initially advised of the fact of those murders during informal discovery on May 28, 1974 (A. 11a-15a) and of the existence of the statements on July 1, 1974 (A. 16a-18a). The Government's position with respect to the statements was set forth in a letter to Judge Cannella dated July 1, 1974, a copy of which was sent to the defense (A.16a-18a). In disclosing that Williams and Henegan were suspects (and had been indicted) in the Taylor homicide, and that Williams, Henegan, Ruddock, Evans and Stitch were suspects in the Daniels homicide (A. 17a-18a) the defense was apprised of all information necessary to embark upon whatever cross-examination was permissible. Under the circumstances, the trial court's decision to seal the statements was clearly correct.

** The Trial Court's charge on this element appears at Tr. 480-481; A. 90a-91a. No exception to this portion of the charge was made below.

pute was whether Stewart was a participant in the robbery (Tr. 10-11, 384-385).* The testimony of the accomplices both as to the events in the bank and the prior robbery at gunpoint of the getaway van left no doubt that the lives of bank customers and employees had been *objectively* "in jeopardy".

It was therefore, at most, harmless error to omit a specific instruction that the jury find that the lives of persons were objectively in danger. *United States* v. *Marshall*, *supra* at 427 F.2d 438. *United States* v. *Cady*, 495 F.2d 742, 747 (8th Cir. 1974).

Appellant's further contention that the trial court improperly rejected the defense's alternative "seven man" theory ** in its charge (Appellant's Brief, Point II) is not supported by the record. In his instructions Judge Cannella focused the jury's attention on the question agreed by both sides to be central, namely, whether or not the seven accomplices were telling the truth. No separate reference was made to either defense theory and neither was rejected—implicitly or explicitly—in the charge.***

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* Even in the absence of express proof that a gun used in a bank robbery is loaded, the jury may infer this fact from the circumstances. *United States* v. *Marshall*, 427 F.2d 437 (2d Cir. 1970); *Morrow* v. *United States*, 408 F.2d 139 (8th Cir. 1969).

** In its summation, the defense contended alternatively (1) that the seven accomplices were lying to protect the real "eighth" culprit or (2) that there were in reality only seven perpetrators, that Williams was the sixth robber depicted in the bank in the photographs (leaving no one outside near the van to guard the front door) and (3) that the seven accomplices had "created" an eighth person in order to make a better deal with the government.

*** During the course of its 30 page charge, the trial court made one reference to the fact that "seven of the eight persons involved in this *case* came here and testified" (Tr. 465; A. 75a) (emphasis added). Stewart, as the defendant on trial, was most

[Footnote continued on following page]

CONCLUSION

The judgment of conviction should be affirmed.*

Respectfully submitted,

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assuredly involved in the "case". The trial court had previously instructed the jury that no inference could be drawn from the fact that he did not testify and that by his guilty plea he had denied that he had anything to do with the robbery (Tr. 460-461; A. 70a-71a).

* It should be noted, however, that the District Court's concurrent sentences for violations of both subsections (a) and (d) of 18 U.S.C. § 2113 was erroneous in view of this Court's decisions in *Gorman* v. *United States*, 456 F.2d 1258 (2d Cir. 1972), and *United States* v. *Pravato*, 505 F.2d 703 (1974). The sentence on Count Two should, therefore, be vacated.

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Form 280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Don D. Buchwald, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 14th day of February he served a copy of the within BRIEF by placing the same in a properly postpaid franked envelope addressed:

David A. Prauda, Esq.
10 East 40th Street
New York, New York 10016

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Don D. Buchwald

Sworn to before me this

14 day of February 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975